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STATE OF ALASKA
THIRD DISTRICT

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Attorneys for Plaintiffs

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

COLASKA, INC. d/b/a SECON and
RICKY KIRBY,

Plaintiffs,

v.

THE STATE OF ALASKA and the
DEPARTMENT OF LABOR AND
WORKFORCE DEVELOPMENT, acting
through COMMISSIONER DR. TAMIKA
L. LEDBETTER, in her official capacity,

Defendants.

Case No. 3AN-19- 8262 CI

COMPLAINT

Plaintiffs Colaska, Inc. d/b/a SECON and Ricky Kirby, by and through their undersigned counsel, Oles Morrison Rinker & Baker LLP, for their complaint against the Defendants, state and allege as follows:

I. INTRODUCTION

1. This action challenges the validity of Alaska's hiring preference law, AS 36.10.150 and the attendant implementing regulation, 8 AAC 30.064 (together, the "Residency Law"). Plaintiffs ask this Court to declare that the Residency Law is

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COLASKA INC. d/b/a SECON and RICKY KIRBY v. THE STATE OF ALASKA and the DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, acting through COMMISSIONER DR. TAMIKA L. LEDBETTER, in her official capacity, Case No. 3AN-19- _____ CI

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unconstitutional; enjoin the State from enforcing the Residency Law in an unconstitutional manner; and order that the State reimburse SECON for the civil penalties SECON has paid to the State for allegedly violating the Residency Law.

2. Plaintiffs challenge the Residency Law both on its face and as applied by the Department of Labor and Workforce Development through its Employment Preference Determination.

3. Plaintiffs' facial challenge attacks the Residency Law because the law gives preferential treatment to workers from one part of Alaska at the expense of workers from other parts of Alaska.

4. Plaintiffs also challenge the Residency Law as applied by the Department. The Department has directed contractors on public works projects to give a minimum of 90% employment preference on public works contracts throughout the state in certain construction-related job classifications. Thus, this requirement discriminates against non-Alaskans and the companies that employ them to work on public works projects in Alaska.

5. As a result, the Residency Law violates the Privileges and Immunities Clause of the United States Constitution ("Privileges and Immunities Clause"), U.S. Const. art. IV, § 2, cl. 1, the Equal Protection Clause of the Alaska Constitution, Alaska Const. art. I, § 1 ("Equal Protection Clause"), and the Commerce Clause of the U.S. Constitution, U.S. Const. art. I, § 8, cl 3 ("Commerce Clause").

II. JURISDICTION AND VENUE

6. This Court has original and general jurisdiction over all civil matters. AS 22.10.020(a). It has jurisdiction to declare rights and legal relations, AS 22.10.020(g), and to issue injunctions, AS 09.40.230 and 22.10.020(c).

7. Venue in this Court is proper under AS 22.10.030 and Rule 3 of the Alaska Rules of Civil Procedure.

III. PARTIES

8. Colaska Inc. d/b/a SECON ("SECON") is an Alaska corporation. It is managed by Alaskans, and over 85% of its workforce is Alaskan. SECON is a general contractor and also performs paving work as a subcontractor primarily on large public construction projects located in southeast Alaska.

9. SECON is a union contractor and is required to hire out of the union hall in Juneau. It makes a point to hire qualified and experienced workers and depends on the union hall to provide enough skilled workers to work on its projects. Paving requires skilled and experienced equipment operators: mistakes can be costly to fix. Unfortunately, the qualified pool of equipment operators is small. There is a larger labor-pool available in Fairbanks and Anchorage, but it is challenging to entice an operator from Fairbanks or Anchorage—where there is typically high demand—to move temporarily to southeast Alaska for a summer job that may only last a few days or weeks. As a result, SECON periodically hires some equipment operators who live outside Alaska.

10. Ricky Kirby is a citizen of the United States and lives in Yakima, Washington. He is a member of the International Union of Operating Engineers, Local 302. For the past eleven years, he has travelled to Alaska for seasonal work. Each of the past eleven years, SECON has hired Kirby out of the local union hall to work as an equipment operator for its paving operations. Kirby travelled to Alaska for work because of the better opportunities here. By working on construction projects approximately half the year in Alaska, Kirby could work more hours each week, and earn more money, than he could working in Washington for the same amount of time.

11. Defendant State of Alaska is the sovereign State of Alaska.

12. Defendant Department of Labor and Workforce Development ("Department") regulates labor in Alaska. Dr. Tamika L. Ledbetter is the Commissioner of the Department and is named in her official capacity (collectively, the State and the Department are referred to as the "Defendants").

IV. HISTORY OF ALASKA RESIDENCY PREFERENCE LAWS

13. Alaska has a long and fraught relationship with residency laws: it has enacted three versions of residence preference laws; courts have struck down each iteration as unconstitutional.

14. Alaska's first residency preference law was its "Alaska Hire" law, enacted in 1972, which the United States Supreme Court struck down as unconstitutional. Alaska's legislature passed the Alaska Hire law before construction on the trans-Alaska oil pipeline

began. The law mandated that oil and gas producers hire Alaskan residents in preference to non-residents. *Hicklin v. Orbeck*, 437 U.S. 518, 520 (1978). Non-Alaskans who could not get pipeline related work challenged the Alaska Hire law under the Privileges and Immunities Clause. They argued that the law unconstitutionally discriminated against nonresidents seeking to work in Alaska. The U.S. Supreme Court agreed. The Court explained that inadequate education and training and/or geographical boundaries caused Alaska's high unemployment rate, not an influx of nonresidents. Thus, the Alaska Hire law was unconstitutional under the Privileges and Immunities Clause because Alaska could not show that "noncitizens constitute[d] a peculiar source of evil at which the statute is aimed." *Id.* at 526.

15. Undeterred by *Hicklin*, Alaska enacted its second employment preference law in 1978, which it amended in 1983. The 1983 statute provided that Alaskan residents perform almost all—90-95%—of the work on public construction projects. An out-of-state worker challenged the new residency requirement law on Privileges and Immunities grounds—essentially repeating the challenge under *Hicklin*. See *Robison v. Francis*, 713 P.2d 259 (1986). As with *Hicklin*, the Alaska Supreme Court struck down the 1983 law under the Privileges and Immunities Clause.

16. In 1986 Alaska enacted yet another residency preference law. This time, Alaska's legislature created four sub-types of hiring preferences for public works projects. These sub-types gave preference to: (1) individuals in zones of underemployment; (2)

individuals in economically distressed zones; (3) economically disadvantaged minority residents; and, (4) economically disadvantaged female residents. AS 36.10. *et seq.* Under the second classification—individuals in economically distressed zones—the statute empowered the Department to identify economically distressed zones within the state. If the Department classified an economically distressed zone, the statute required that contractors give qualified residents in the zone at least 50% hiring preference on public projects. The statute applies on a craft-by-craft or occupational basis; the department must designate these occupations in its determination. AS 36.10.160.

17. A little over a year after Alaska created these preferential hiring categories, Enserch and two employees challenged AS 36.10.160 under the equal protection clause of the Alaska Constitution, and specifically that portion of the statute creating “economically distressed zones.” *See State, By & Through Departments of Transp. & Labor v. Enserch Alaska Const., Inc.*, 787 P.2d 624, 625 (1989).

18. The Court found for the plaintiffs and held that the portion of the statute addressing “economically distressed zones” violated the Alaska’s Equal Protection Clause. The statute was unconstitutional because the right affected by the statute—to engage in an economic endeavor in a particular industry—was an important one, and thus required that the state’s interest underlying the enactment be both legitimate and closely related to the interest it serves. Yet the legislation disparately treated unemployed workers in one region to confer an economic benefit on similar workers in another region. The Court held that

economically assisting one class over another was not a legitimate legislative goal and ruled that statute violated the Equal Protection Clause.

V. FACTUAL ALLEGATIONS

19. The first of the four types of residency preference laws Alaska enacted in 1986 is the subject of this Complaint: AS 36.10.150 (establishing zones of underemployment).

20. AS 36.10.150 provides that once the Department determines that a zone of underemployment exists, qualified residents within the zone "shall be given preference in hiring for work on each project under AS 36.10.180 that is wholly or partially sited within the zone." AS 36.10.150(a). Further, the Department "shall determine the amount of work that must be performed under this section by qualified residents." AS 36.10.150(b).

21. Under this statute, the Department issued 8 AAC 30.064 which provides that the Department will determine a zone of underemployment exists if four criteria are met:

- (1) the rate of unemployment within the area is at least 10 percent greater than the average national unemployment rate for the most recent 12-month period for which unemployment insurance figures are available, or a longer period determined appropriate by the commissioner to take into account unemployment trends exceeding a one-year period . . .
- (2) at least 10 percent of the jobs in a particular craft or occupation that would be used on a particular public-funded project could be filled by residents of the area who are trained or experienced in that craft or occupation . . .

(3) the lack of employment opportunities has substantially contributed to serious social or economic problems in the area, as determined under 8 AAC 30.068; and

(4) the employment of nonresidents is a peculiar source of unemployment for residents of the area, as determined under 8 AAC 30.069.

22. Under AS 36.10.150 and 8 AAC 30.064, the Department issued a determination on July 1, 2015 that "the entire State of Alaska [is] a Zone of Underemployment." See July 1, 2015 Employment Preference Determination, attached here as **Exhibit A**. Under this authority, the Department stated that a "Zone of Underemployment requires that Alaska residents who are eligible under AS 36.10.140 be given a minimum of 90% employment preference on public works contracts throughout Alaska." The Department's June 2015 determination expired on June 30, 2017.

23. The Department restated its determination on or about July 1, 2017 (the "2017 Determination," attached here as **Exhibit B**) and again on July 1, 2019 ("Exhibit C"). The 2017 and 2019 Determinations, as with the 2015 version, provided that the entire state of Alaska was a zone of underemployment.

24. The 2017 and 2019 Determinations both require that "Alaska residents who are eligible under AS 36.10.140 be given a minimum of 90 percent employment preference on public works contracts throughout the state in certain job classifications." Further, the

Determinations require that the 90 percent Alaska resident hire preference applied to twenty-three (23) crafts, including equipment operators.¹

25. In July 2017, the Department fined SECON \$3,678.34 for SECON's work on the Edge Water System Replacement, DOL# 16/07-96403J. SECON paid this fine.

26. In addition, since February 2019, the Department has issued seventeen complaints to SECON for alleged violations of the Residency Law:

Project Name	Citation Date	Penalty \$
2017 Pavement Overlays Surface Repair	2/15/2019	\$55,721.89
2018 Area Wide Paving	2/15/2019	\$11,881.06
Aspen Avenue Pavement & Drainage	2/15/2019	\$6,482.09
F Street Reconstruction	2/15/2019	\$2,943.28
Fawn Mountain Elementary School Sidewalk Construction and Asphalt Restoration Project	2/15/2019	\$1,913.60
Governor's House Area Road Recon	2/15/2019	\$4,048.68
Mendenhall Wastewater Treatment Plant Biosolids Dryer Facility	2/15/2019	\$2,638.92
Sea Level Drive Storm Drain & Surface Improvements	2/15/2019	\$2,689.28
Sitka Paving Project 2017	3/01/2019	\$21,031.30
McGinnis Subdivision Paving, Phase III—Steelhead Street	3/22/2019	\$5,964.95
2018 Pavement Overlays-Surface	4/30/2019	\$8,812.79
Birch Lane Pavement And Drainage Improvements	5/20/2019	\$5,463.15
D&H Streets Reconstruction	5/20/2019	\$1,570.01
Downtown Street Improvements-Phase I	5/20/2019	\$18,487.44
Front Street Culvert and Stairs Replacement	5/20/2019	\$444.01
Shaune Drive Pavement and Drainage Improvements	5/20/2019	\$3,729.02

¹ The twenty-three crafts identified in the Determinations are (1) Boilermaker; (2) Bricklayers; (3) Carpenters; (4) Cement Masons; (5) Culinary Workers; (6) Electricians; (7) Engineers and Architects; (8) Equipment Operators; (9) Foremen and Supervisors; (10) Insulation Workers; (11) Ironworkers; (12) Laborers; (13) Mechanics; (14) Millwrights; (15) Painters; (16) Piledriver Occupations; (17) Plumbers and Pipefitters; (18) Roofers; (19) Sheet Metal Workers; (20) Surveyors; (21) Truck Drivers; (22) Tug Boat Workers; and (23) Welders.

Project Name	Citation Date	Penalty \$
South Tongass Asphalt Overlay	5/20/2019	\$4,848.82

27. SECON will suffer damages of \$158,670.29 if it pays these unconstitutional fines.

28. SECON will also continue to incur damages as a direct and proximate result of the requirements and enforcement of the Residency Law. Among other things:

- a. SECON will lose business if it bids on public works projects because there are not enough skilled Alaska residents to comply with the Residency Law's hiring requirements;
- b. SECON will not be able to achieve the requirements of the Residency Law on any kind of scale and SECON's failure to meet the requirements will result in more fines; and
- c. Qualified workers are not available among Alaska residents and are often available only from outside the region. It is costly and time consuming to for SECON to find workers that satisfy the Residency Law's requirements.

29. Likewise, Defendants' enforcement of Residency Law has directly and proximately damaged Kirby. Among other things:

- a. SECON has and will likely continue, when possible, to reassign Kirby to non-public works projects to comply with the Residency Law and

to avoid the imposition of fines. When SECON reassigns Kirby, he often works fewer long-term and remunerative assignments than he otherwise would have.

- b. Likewise, as a result of the fines the Department has assessed against SECON and SECON's increased costs to comply with the Residency Law, Kirby's prospects of working for SECON in Alaska on future work is diminished. Simply put, SECON is less likely hire Kirby as a result of the fines and the regulatory burden of complying with the Residency Law, even though Kirby is a well-qualified and experienced operator who has a proven track record with SECON.

COUNT I: Violation of the Privileges and Immunities Clause
(As Applied Challenge on Behalf of Ricky Kirby)

30. Plaintiffs re-allege each of the previous allegations here.

31. A state law violates the Privileges and Immunities Clause when: (1) the "challenged restriction deprives nonresidents of a privilege or immunity protected by the Clause" and (2) "there is [no] substantial reason for the difference in treatment" and "the discrimination practiced against nonresidents [does not bear] a substantial relationship to the State's objective." *Barnard v. Thorstenn*, 489 U.S. 546, 552 (1989).

32. The right to pursue a living in a particular line of work is a fundamental right. *Sheley v. Alaska Bar Association*, 620 P.2d 640, 643 (1980).

33. As a result, employment in the construction industry is a fundamental right, protected by the Privileges and Immunities Clause. *Robison*, 713 P.2d at 265; *Enserch*, 787 P.2d at 624.

34. As applied, the Residency Law requires SECON, and any other contractor working on a public works project that uses laborers in the designated industries, to hire 90% Alaska residents for public works project located anywhere in Alaska.

35. Alaska does not have a substantial justification for the Residency Law because there is no valid independent reason for the disparate treatment of non-Alaska residents. Nor will discriminating against non-Alaskans improve Alaska's unemployment issues because non-residents are not the "peculiar source of the evil at which the statute is aimed." *Hicklin*, 437 U.S. at 525-26; *Toomer v. Witsell*, 334 U.S. 385, 396 (1948).

36. The Residency Law, thus, unlawfully discriminates against out-of-state individuals like Kirby who have the requisite skill, knowledge, and experience to work on publicly funded projects in Alaska, but for the Residency Law. *United Bldg. & Constr. Trades Council of Camden County v. Mayor & Council of City of Camden*, 465 U.S. 208 (1984).

37. Because of the fines the Department imposed, the threat of other fines, and the increased regulatory burden resulting from the Residency Law, SECON will limit the number of public work projects it bids on in Alaska and may not hire Kirby on future

projects. Thus, as a direct and proximate result of the Residency Law, Kirby will work on fewer public works projects for SECON in Alaska.

38. For these reasons, the Residency Law violates the Privileges and Immunities Clause in Article IV, section 2, clause 1, of the United States Constitution.

**COUNT II: Violation of Alaska's Equal Protection Clause
(Facial Challenge on Behalf of Plaintiffs)**

39. Plaintiffs re-allege each of the previous allegations here.

40. On its face, the Residency Law violates the equal protection clause of the Alaska Constitution.

41. The equal protection clause of the Alaska Constitution, Article I, section 1, provides that "all persons are equal and entitled to equal rights, opportunities, and protection under the law." Alaska's equal protection clause requires that all enactments be substantially related to a legitimate state interest. Disparate treatment of workers in one region over workers in other regions is an impermissible legislative goal. *Enserch*, 787 P.2d at 634. And the right to engage in an economic endeavor within a particular industry is recognized as an important right under Alaska's constitution. *Enserch*, 787 P.2d at 632.

42. The Residency Law thus impacts Plaintiffs' ability to work in a particular industry: construction. Public works account for the majority—between 60 and 70%—of commercial construction activity in Alaska. The Residency Law, thus, imposes significant limitations on construction workers' overall employment opportunities.

43. The Residency Law, thus, violates the rights of workers—like Kirby—without furthering compelling state interests by the least restrictive means by, among other things, pitting workers outside zones of underemployment against workers from zones of underemployment.

44. In addition, the Residency Law violates the rights of companies—like SECON—without furthering compelling state interests by the least restrictive means by, among other things, discriminating against companies that must hire some qualified workers outside zones of underemployment against companies that choose to hire workers from zones of underemployment.

COUNT III: Violation of Alaska's Equal Protection Clause
(As Applied Challenge on Behalf of Plaintiffs)

45. Plaintiffs re-allege each of the previous allegations here.

46. As applied, the Residency Law favors Alaska workers over non-Alaska workers. It mandates that contractors on public works projects funded by Alaska give a minimum of 90% hiring preference to workers who reside in Alaska. In effect, the Residency Law requires public works contractors to hire Alaska residents for at least 90% of the positions for every project on a craft-by-craft or occupational basis.

47. Discrimination between Alaska residents and nonresidents based solely on the objective of economically assisting one class over the other violates the equal protection clause of the Alaskan Constitution. *Lynden Transp. v. State*, 532 P.2d 700, 710 (1975). In

particular, Alaska's Constitution prohibits discrimination between state residents and nonresidents to the same extent it prohibits discrimination among state residents. *Enserch*, 787 P.2d at 634.

48. Thus, as applied, the Residency Law violates the equal protection clause of the Alaska Constitution. In particular, the Residency Law violates the rights of workers—like Kirby—without furthering compelling state interests by the least restrictive means by, among other things, discriminating against non-Alaskan workers to assist Alaskan workers.

49. In addition, the Residency Law violates the rights of companies without furthering compelling state interests by the least restrictive means by, among other things, discriminating against companies that have to hire some qualified non-Alaska residents for public works projects in Alaska.

PRAYER FOR RELIEF

For these reasons, this Court should grant Plaintiffs SECON and RICKY KIRBY the following relief:

1. Count I: Declare the Residency Law unconstitutional under the Privileges and Immunities Clause and enjoin the Department from enforcing the Residency Law.
2. Counts II and III: Declare the Residency Law unconstitutional under the Equal Protection Clause, both on its face and as applied, enjoin the Department from enforcing the Residency Law, and order that the Department return the civil penalties SECON paid to the state for alleged violations of the Residency Law.

3. For an award of attorneys' fees and costs as the prevailing party in this action.

4. For such additional relief as this Court deems appropriate.

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Dated: July 12, 2019

By: 

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